



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17706/2016

THE IMMIGRATION ACTS

Heard at North Shields
On 7 September 2018

Decision & Reasons Promulgated
On 17 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

M. A.
(ANONYMITY ORDER MADE)

Appellant

And

SECRETARY OF STATE

Respondent

Representation:

For the Appellant: Ms Cleghorn, Counsel instructed by Lupins
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant says he is a national of Eritrea, who was granted refugee status in Italy on that basis in December 2013. He left Italy and entered the UK illegally in 2014. He attempted to claim asylum once again but was identified as one with refugee status in Italy, was initially detained and then released on bail. He failed to honour reporting conditions, and was next encountered at Gatwick airport in the company of his wife, MG, where he was again detained. Neither the Appellant nor MG have admitted that she entered the UK by air (although she was then said to be staying at a hotel at Gatwick airport), and the Respondent has not sought to prove that she did.

2. MG claimed asylum in her own right, as a national of Eritrea when encountered. She claimed to have married the Appellant in the Sudan in 2012 when both had fled there from Eritrea. The Respondent did not accept that she was Eritrean as claimed, and her protection claim was refused on 3 November 2015. MGs appeal against that decision came before the First-tier Tribunal at North Shields when it was heard by First-tier Tribunal Judge Fisher. The appeal was dismissed in his decision promulgated on 26 September 2016, in the course of which MGs claim to be Eritrean was rejected. MG repeated her claim to have fled Eritrea for the Sudan, and to have married the Appellant there. The Judge does not appear to have been made aware that when the Appellant had tried to claim asylum in the UK, he had said that his wife and son born in December 2013, were living in Ethiopia (a claim that MG has never made, and which she denies was ever true). Nevertheless the Judge noted that MG had been inconsistent in her evidence about her parents' situation and rejected her claim to be a national of Eritrea. The Judge was not asked by the Respondent to make a positive finding that MG was in truth Ethiopian, and did not do so.
3. In the meantime, on 2 September 2015 removal directions were set for the Appellant's removal to Italy on 11 September 2015. They were cancelled on 10 September 2015 in the face of an application for judicial review, and a further decision was made upon the Appellant's Article 8 claim that relied upon his relationship with MG on 4 July 2016, to refuse it.
4. The Appellant's Article 8 appeal against the decision of 4 July 2016 came before the First-tier Tribunal at North Shields when it was heard by First-tier Tribunal Judge Duff. The appeal was dismissed in his decision promulgated on 25 October 2017. Having heard evidence from them both, Judge Duff made a finding that MG was a national of Ethiopia. In turn he concluded that the family could live together in safety either in Italy or Ethiopia, and thus any interference in their Article 8 rights was proportionate to the public interest in their removal.
5. The Appellant's application for permission to appeal was refused by First tier Tribunal Judge Lambert on 10 April 2018 as no more than an attempt to reargue the appeal. The renewed application was however granted by Upper Tribunal Judge Allen on 12 June 2018 on the basis the complaints were arguable. He noted that the grounds were incomplete, but as Ms Cleghorn accepts, that situation has not been rectified. No Rule 24 Reply was lodged by the Respondent, and no application has been made by either party to rely upon further evidence. Thus the matter comes before me.
6. The grounds offer no challenge to the finding of fact made by Judge Duff that MG is a national of Ethiopia. That finding was well open to him on the evidence, and, it is properly reasoned. It must stand. No evidence was placed before Judge Duff, or before the Upper Tribunal to suggest that MG's two children failed to derive Ethiopian citizenship through her. That inference is consistent with the content of the CPIN for Ethiopia, and it must be the starting point for any consideration of paragraphs 13-17 of the grounds. They seek to challenge the Judge's conclusion that it was open to the family to relocate to Ethiopia, and, live together there in safety.

However, no complaint was made in relation to Judge Duff's finding that it was open to the Appellant to acquire leave to enter Ethiopia as MGs spouse, and as the father of her two children. Instead, as Ms Cleghorn argued it, there were two limbs to the Appellant's challenge.

7. The first complaint is that Judge Duff erred in his approach to the Appellant's claim that his daughter (born in the UK in July 2016) faced a risk of FGM in the event the family sought to live together in Ethiopia. Judge Duff noted, correctly, that the practice of FGM was specifically criminalised in Ethiopia in 2005 [F76]. Judge Duff also noted that whilst MG had claimed to have been subjected to the practice when a child, both she and the Appellant had claimed in evidence that they were opposed to the practice. Thus he concluded that there was no reason to suppose that any real risk of FGM to their daughter existed [20]. Ms Cleghorn argued that the evidence that was before Judge Duff did not support such a conclusion, but the only evidence she sought to refer me to in this respect was a Voice of America article of 5.1.17 [F33], and a PambazukaNews article of 13.1.16 [F76]. It is quite clear that both of these sources (however reliable they may be) supported the Judge's conclusion. Indeed Voice of America noted that by 2008 less than 5% of the population supported the practice of FGM, and both articles noted the massive change in societal attitudes that had taken place in Ethiopia. Thus there is no basis for the suggestion that the Judge failed to take into account relevant evidence on the issue.
8. The second complaint is that Judge Duff failed to consider the position of the Appellant as an Eritrean national living in Ethiopia, and to assess this in the round together with the family's economic vulnerability as returnees. As to the latter, if the couple accepted voluntary removal to Ethiopia they would of course have access to the financial support offered to those who do. With that financial support, and the support of MGs family in Ethiopia, it was well open to the Judge to conclude that there were significant benefits to the Appellant's daughter in being brought up in Ethiopia. (In passing I note that this child would have the benefit of growing up with the elder sibling she appears to have never met, and who on Judge Duff's findings must be taken to have been left in Ethiopia by MG, and not the Sudan as was initially claimed). There is in my judgement no proper evidential basis, or basis within the Judge's findings, for any inference to be drawn that the Appellant's family would face destitution in Ethiopia. Equally there is no proper evidential basis for Ms Cleghorn's argument that the Appellant's daughter would face significant discrimination as a child who would be perceived to be mixed ethnicity. On the Judge's findings she is Ethiopian [20], and the evidence did not suggest that she would be perceived otherwise, or, that she would experience any difficulties if she were. Asked to identify what, (if any) evidence before the Judge had pointed to the existence of a risk of discrimination at such a level that would amount to persecution, Ms Cleghorn accepted that there had been none. She argued nevertheless that having found that MG was a national of Ethiopia, then Judge Duff ought to have referred himself to the relevant CPIN for Ethiopia before making any findings about risk of harm or discrimination. She did not however produce any relevant CPIN at the hearing. Having referred myself to the August 2016 CPIN "*Ethiopia; People of mixed*

Eritrean/Ethiopian nationality” I note that the argument gains no support from its content. Indeed it states as follows;

‘2.2 In 2003/4 the government introduced laws which regularised the position of Ethiopians of Eritrean origin remaining in Ethiopia and subsequent to this state harassment diminished. There is no recent evidence that Ethiopians of Eritrean origin living in Ethiopia are at risk of persecution.’

9. Accordingly, even if Judge Duff had referred himself to the Ethiopia CPIN, it would have made no difference to his conclusions. There was no material error of law in Judge Duff’s conclusions concerning the ability of the family to live together in safety in Ethiopia. The Respondent accepts that the Appellant, MG and their daughter would be removed from the UK together as a family unit. Since the family would be removed together, and would indeed be reunited with their eldest child, any Article 8 appeal could only be approached through the “private life” gateway. The grounds do not demonstrate any material error of law in Judge Duff’s approach to the proportionality of the expectation that they should live together in Ethiopia.
10. The alternative considered by Judge Duff was that the Appellant and his family should live together in Italy, relying upon his refugee status there, and his family’s consequent ability to gain leave to enter and to live with him there. (Ms Cleghorn accepts that the evidence before Judge Duff demonstrated clearly that it would technically be open to them to do so.) The grounds complain however that in finding that it was open to them to do so, Judge Duff overlooked material evidence as to whether they would be rendered destitute, homeless, and face a breach of their Article 3 rights; and thus wrongly distinguished the decisions in Tarakhel (27217/12) (2015) 60 EHRR 28; ZAT [2016] EWCA Civ 810 and NA (Sudan) [2016] EWCA Civ 1060.
11. If there were no error of law in Judge Duff’s approach to whether it was reasonable to expect the family to live together in Ethiopia, then as Ms Cleghorn accepted it was immaterial whether or not he fell into any error in his consideration of what their position might, or might not be, in Italy. In so saying, I do not intend any inference to be drawn that I have concluded that he did. It is simply unnecessary for me to consider the argument, which has become a sterile one. Accordingly I am not satisfied that the grounds demonstrate any material error of law that requires the Judge’s decision to be set aside and remade, and, I dismiss the appeal.

Notice of decision

The decision promulgated on 25 October 2017 did not involve the making of an error of law sufficient to require the decision to be set aside. The decision of the First tier Tribunal to dismiss the appeal on Article 8 grounds is accordingly confirmed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 11 September 2018

Deputy Upper Tribunal Judge J M Holmes